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Supreme Court, U.S.  
FILED

05 - 955 JAN 27 2008

No.

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IN THE

**Supreme Court of the United States**

ROBERT KRILICH, PETITIONER

v.

DAVID L. WINN

*PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether the appellate court incorrectly denied petitioner habeas corpus relief under 28 U.S.C. § 2241 because it applied the wrong prerequisite test in determining it lacked jurisdiction to entertain the petition.

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## **PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Robert R. Krilich, Sr., petitions for a writ of certiorari to review the judgment of the First Circuit in this case.

### **OPINIONS BELOW**

The district court granted the government's motion to dismiss petitioner's Petition for Habeas Corpus Review pursuant to 28 U.S.C. § 2241. Pet. App. 15a-25a. The First Circuit granted the government's motion for summary disposition in an unpublished order. *Id.* 1a-2a.

### **JURISDICTION**

The court of appeals judgment was entered on September 6, 2005. On November 28, 2005, Justice Souter extended the time to file this petition to and including February 3, 2006. App. No. 05A472. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

### **RELEVANT STATUTORY PROVISIONS**

Title 28, Section 2241 of the United States Code provides, in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The

order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

\*\*\*\*\*

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color or the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) he is in custody in violation of the Constitution or laws or treaties of the United States; or

\*\*\*\*\*

Title 28, Section 2255 ¶5 of the United States Code provides, in pertinent part:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Title 18, Section 1962 of the United States Code provides, in pertinent part:

(a) It shall be unlawful for any person who has



received any income derived, directly or indirectly, from a pattern of racketeering activity ... , to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

\*\*\*\*\*

(b) It shall be unlawful for any person through a pattern of racketeering activity ... to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ....

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18, Section 1961 of the United States Code provides, in pertinent part:

As used in this chapter -

(1) "racketeering activity" means (A) any act or threat involving ... bribery, which is chargeable

under State law and punishable by imprisonment for more than one year; ....

\*\*\*\*\*

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

### STATEMENT

In 1995, petitioner was convicted in the federal court of the Northern District of Illinois of conspiracy for violating the Racketeer Influenced and Corrupt Organizations (RICO) Act 18 U.S.C. § 1962 and making false statements to banks in violation of 18 U.S.C. § 1014. *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998).

In order to prove the RICO charge, the indictment alleged two acts of "racketeering activity," or so-called "predicate acts," necessary to support the RICO charge. Pet. App. 3a-11a; see *Salinas v. United States*, 522 U. S. 52, 62 (1997). The first predicate act was mail fraud, in violation of 18 U.S.C. § 1341. Superseding Indictment. See Superseding Indictment, Count 1, paragraph 3.(a). Pet. App. 5a. The second predicate act consisted of five alleged "overt acts" of state bribery. *Id.* paragraph 3.(b).

The five overt acts of state bribery were listed in the indictment to prove the second predicate act needed to establish a "pattern of racketeering activity." Each of the five overt acts involved bribery of a local public official "which is chargeable under State law and

punishable by more than one year." 18 U.S.C. § 1961(1)(A). Thus, in order for petitioner to be convicted of the RICO charge, the jury was required to find that at least one of the five overt acts occurred.

Two of the five overt acts alleged in the indictment were based on alleged violations of Illinois state law for which the statute of limitations had expired at the time of the indictment. The maximum statute of limitations under Illinois law for crimes based on the bribery of a public officer is six years. 720 ILL. COMP. STAT. 5/3-6(b).

The first overt act alleged was based on bribery of a local official that took place in 1983, over twelve years prior to the charges in this case. Pet. App. 6a-7a. This was well past the six year State of Illinois statute of limitations for such offenses. The fourth overt act of bribery of a local official alleged in the superseding indictment took place at the end of January 1989, which also exceeded the maximum statute of limitations that petitioner could have been charged with this offense under Illinois law. *Id.* 10a-11a.

With respect to the RICO conspiracy charge, the verdict form did not require any specific finding by the jury regarding which of the five overt acts of state bribery alleged in the indictment petitioner was guilty. The question on the verdict form only asked for a verdict of guilty or not guilty on the RICO charge. See Verdict Form. Pet. App. 12a.-14a. Thus, it is impossible to know whether the jury relied on either of these two overt acts, needed to support the second predicate act, for which the Illinois statute of limitations had run.

On June 26, 2003, this Court decided *Stogner v. California*, 539 U.S. 607 (2003), which held that a statute violates the Ex Post Facto Clause if it revives a statute of limitations that has expired in a criminal

case. In his § 2241 petition, petitioner argued that based on *Stogner* he was actually innocent of the RICO charge because he could not be charged with a crime, labeled as an "overt act," since the statute of limitations had already run.

The government moved the court to dismiss the motion on September 7, 2004. Although some of the same crimes which constituted overt acts needed to support the second predicate act of racketeering were time barred under Illinois law, the district court held that *Stogner* did not alter the substantive law on which petitioner was convicted. Pet. App. at 22a. The court concluded that petitioner's motion should have been brought under 28 U.S.C. § 2255 and dismissed the motion on December 10, 2004, for lack of jurisdiction. *Id.* 15a, 23a.

Petitioner appealed the district court's dismissal for lack of jurisdiction. As he did in the district court, petitioner acknowledged that a petitioner must typically bring a motion for habeas corpus relief under 28 U.S.C. § 2255. However, he argued that his case fell within the well established exception to this rule known as the "savings clause." Under the so-called "savings clause," when § 2255 "is inadequate or ineffective to test the legality of his detention," a petitioner may seek habeas corpus relief under 28 U.S.C. § 2241. See 28 U.S.C. § 2255 ¶ 5.

On September 6, 2005, the court of appeals denied petitioner relief affirming the district court's dismissal. The appellate court stated:

Because petitioner does not challenge the execution of his sentence, but, rather, challenges the constitutional validity of his conviction, §2255, and not §2241, is the proper vehicle for his